



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:

1800B3-SS

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In re: **NEW(FM), Carmel Valley, CA**
Facility ID No. 164096
Aurora Communications, Inc.
File No. BNPH-20050103AIN
Petition for Reconsideration

File No. BAPH-20080502ABW
Petition to Deny

Dear Counsel:

We have before us Petitions for Reconsideration (collectively, the "Petition") filed by Buckley Broadcasting of California, LLC ("Buckley") on January 22, 2008, and May 27, 2008.¹ The Petition asks for reconsideration of a December 21, 2007, staff decision² granting the application of Aurora Communications, Inc. ("Aurora") for a new commercial FM facility to serve Carmel Valley, California (the "Application"). We also have before us an application seeking consent to the assignment of the Carmel Valley construction permit from Aurora to Lazer Licenses, LLC (the "Assignment Application") against which Buckley filed a Petition to Deny on June 6, 2008 (the "Assignment Petition").³ For the reasons set forth below, we deny the Petition, deny the Assignment Petition and grant the Assignment Application.

Background. Aurora timely filed the Application on January 3, 2005, on the deadline established for Auction No. 37 winning bidders.⁴ Buckley filed a Petition to Deny the Application on February 7, 2005, and filed "Supplements" to the Petition to Deny on May 6, 2005, and on February 1,

¹ Aurora Communications, Inc., filed Oppositions on February 11, 2008, and June 10, 2008 (collectively, the "Opposition"). Buckley replied to Aurora's February 11, 2008, Opposition on February 28, 2008.

² *Letter to Aurora Communications, Inc.*, Reference 1800B3 (MB rel. Dec. 21, 2007) ("*Staff Decision*").

³ Aurora filed an Opposition to the Assignment Petition on June 18, 2008, to which Buckley replied on June 30, 2008.

⁴ *See FM Broadcast Construction Permits Auction Closes*, Public Notice, 20 FCC Rcd 1021 (WTB/MB 2004).

2007.⁵ Buckley argued in its Petition to Deny and subsequent related pleadings that Aurora's proposed antenna site would not offer line-of-sight service nor provide sufficient signal coverage to Carmel Valley.

On January 19, 2007, Aurora amended the Application, attaching an exhibit purporting to demonstrate adequate city coverage of Carmel Valley using the standard contour prediction method set forth in Section 73.313 of the Commission's Rules (the "Rules").⁶ The Application, as amended, also provided a showing containing terrain profiles at relevant radials. In its February 1, 2007, supplemental pleading, Buckley submitted an engineering exhibit purporting to demonstrate that, using the Longley-Rice alternative model of contour prediction, the proposed facility failed to provide a 70 dBu strength signal to 80 percent or more of the population or area within the corporate boundaries of Carmel Valley,⁷ as required by Section 73.315 of the Rules.⁸ Buckley also claimed that the path from the proposed antenna site to the city of license was blocked by mountainous terrain.

The staff forwarded the materials to the Commission's Office of Engineering and Technology ("OET") to perform an independent study. OET concluded that there was no major terrain obstruction and that the Application, as amended, demonstrated compliance with Section 73.315. The staff therefore denied Buckley's Petition to Deny and subsequently granted the Application.⁹

In its Petition, Buckley seeks reconsideration of the grant of the Application arguing that: (1) the *Staff Decision* does not satisfy Administrative Procedure Act ("APA") requirements; (2) the staff failed to address Buckley's contentions that Aurora's proposal would provide neither line-of-sight to the majority of Carmel Valley's geographic area and population nor adequate 70 dBu coverage of that community's area and population; and (3) the staff erred in concluding that there is not a major terrain obstruction between the transmitter site and Carmel Valley. In its Petition to Deny the Assignment Application, Buckley incorporates by reference arguments previously advanced in the Petition. Buckley adds that the issues raised in the Petition must be resolved before the Assignment Application can be considered.

Discussion. Procedural Matter: Standing. Aurora argues that Buckley lacked standing to file its February 7, 2005, Petition to Deny and therefore lacks standing to file the Petition.¹⁰ Specifically, Aurora contends that Buckley has failed to establish that it is a "party in interest." Although Aurora concedes that Buckley owns two stations in the Monterey-Salinas-Santa Cruz Arbitron radio market¹¹ – which includes Carmel Valley – it concludes that Buckley fails to demonstrate how Aurora's proposed station would be harmful to the operation of Buckley's stations.¹²

⁵ Aurora filed an Opposition to the Petition to Deny on March 24, 2005, to which Buckley replied on April 26, 2005. Additionally, Aurora opposed Buckley's supplemental filings on February 14, 2007, and Buckley replied on February 28, 2007.

⁶ 47 C.F.R. § 73.313.

⁷ See "Comments on Further Amendment and Supplement to Petition to Deny" filed by Buckley on February 1, 2007.

⁸ 47 C.F.R. § 73.315.

⁹ See *Public Notice*, "Broadcast Actions," Report No. 46723 (rel. Apr. 25, 2008).

¹⁰ Opposition at 1. Unless specifically indicated, "Opposition" citations in this text refer to Aurora's February 11, 2008, filing.

¹¹ KWAV(FM), Monterey, California, and KYZZ(FM), Salinas, California.

¹² Opposition at 2.

Buckley had standing to file the February 7, 2005, Petition to Deny. It is well established that a competitor of an applicant has party-in-interest status.¹³ Here, Buckley's stations are located in the same market as Aurora's proposed station. Contrary to Aurora's assertions, where standing is derived from status as a competitor in the market, a petitioner "does not need to demonstrate that it will suffer a direct injury from grant" of an application.¹⁴ Nor, as a competitor, "must it demonstrate, or even allege . . . that it will be subjected to increased or materially different competition as a result of the proposed assignment."¹⁵

Section 405 of the Communications Act of 1934, as amended, states that any party to an order, decision, report or action by the Commission or any other person aggrieved or whose interests are adversely affected, may petition for reconsideration.¹⁶ A party, such as Buckley, that filed a petition to deny has standing to file a petition for reconsideration.¹⁷

Substantive Matters. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of petitioner's last opportunity to present such matters.¹⁸ As set forth below, Buckley has not met this test.

On reconsideration, Buckley again argues that the Application should not be granted because terrain obstructions prevent the required coverage of Carmel Valley. Buckley argues that an analysis using the Longley-Rice alternative contour-prediction methodology,¹⁹ which it submitted in its Petition to Deny, demonstrates that Aurora's proposed transmitter site can provide line-of-sight to only 43.6 percent of Carmel Valley's population and 45.7 percent of its geographic area.²⁰ Buckley adds that the Longley-

¹³ See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-477 (1940).

¹⁴ See *Waterman Broadcasting Corporation of Florida*, Letter, 17 FCC Rcd 15742, 15744 n.2 (MB 2002) (citing *American Mobilphone, Inc. and Ram Technologies, Inc.*, Order, 10 FCC Rcd 12297, 12298 (WTB 1995) ("American Mobilphone").

¹⁵ *American Mobilphone*, 10 FCC Rcd at 12298.

¹⁶ 47 U.S.C. § 405. See also 47 C.F.R. § 1.106.

¹⁷ See 47 C.F.R. § 1.106(b). Compare *Randy Henry*, Letter, 22 FCC Rcd 2305, 2306 (MB 2007); *Sagittarius Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 22551 (2003); *Citicasters Co.*, Memorandum Opinion and Order, 14 FCC Rcd 17900 (MB 1999); *Arizona Lotus Corp.*, Memorandum Opinion and Order and Forfeiture Order, 11 FCC Rcd 5339 (1996); *Gulfcoast Broadcasting, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 483 (1993); *Redwood Microwave Assoc.*, Memorandum Opinion and Order, 61 FCC 2d 442 (1976) (all holding that an informal objector, unlike someone who has filed a valid petition to deny, lacks standing as a party to file a petition for reconsideration).

¹⁸ 47 C.F.R. § 1.106; *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹⁹ This methodology was developed by the National Telecommunications and Information Administration and based on NBS Technical Note 101. It is permitted by Section 73.313(e) and (f) of the Rules to calculate the distances to contours.

²⁰ Petition at 13.

Rice study shows that terrain obstructions limit the proposed station's ability to provide a 70 dBu signal to only 44 percent of the population and 51 percent of the geographic area of Carmel Valley.²¹

We disagree. As stated in the *Staff Decision*, OET has examined the terrain profiles along the 315-degree, 320-degree, 325-degree, 330-degree, 335-degree, and 340-degree azimuths through Carmel Valley for a distance of 30 kilometers from the proposed transmitter site using a 3-arc-second terrain database. Evaluating each of the radials extending from the transmitter site in the direction of Carmel Valley, OET staff acknowledged that a portion of Carmel Valley did not have line-of-sight service from the proposed transmitter site. However, OET determined that the lack of line-of-sight to some locations did not constitute a "major" obstruction and that, in this case, the proposed facility's predicted 70 dBu contour covered all of Carmel Valley.²² Additionally, we note that line-of-sight coverage of the entire community of license is not an absolute requirement.²³ Adequate coverage may still be obtained from the diffracted signal.²⁴ We therefore find that there was no material error or omission in the *Staff Decision* regarding Aurora's proposed coverage of Carmel Valley.

Finally, Buckley argues at length in the Petition that the *Staff Decision* is "such a brief, opaque statement" that it is "insufficient to satisfy the APA's requirement that the Commission provide a reasoned basis for its actions."²⁵ Buckley therefore claims that its arguments were not addressed in the *Staff Decision* and that the staff's conclusions are "simply in error."²⁶ Again, we disagree. We find that the staff's discussion of the issue adequately addressed the arguments raised by Buckley.²⁷ We conclude that the staff's denial of Buckley's February 7, 2005, Petition to Deny and supplemental filings provided a concise statement of the reasons sufficient to justify its technical analysis.²⁸

²¹ *Id.*

²² See *Jackson and Salyersville, Kentucky*, Report and Order, 17 FCC Rcd 4662, 4663 (2002); see also *Madison, Indiana*, Report and Order, 14 FCC Rcd 9518 (1999) (Channel 266A allotted to Madison where petitioner was able to show that 70 dBu signal extends beyond the city of license despite lack of line-of-sight service to portions of Madison due to a terrain obstruction); *Vacaville and Middletown, California*, First Report and Order, 4 FCC Rcd 8315 (1989), *recon. denied*, Memorandum Opinion and Order, 6 FCC Rcd 143 (1991) (reference site that cannot provide light-of-sight coverage still suitable where the proponent demonstrates that the transmitted signal will exceed 70 dBu over the entire principal community).

²³ See *Rush County Broadcasting Co., Inc.*, Memorandum Opinion and Order, 26 FCC 2d 480 (1970) (line-of-sight to the community is not an absolute requirement); see also *Margaret C. Schaller*, Hearing Designation Order, 5 FCC Rcd 5329 (1990) (opposing party has not made a convincing showing that a terrain obstruction precluded line-of-sight to the proposed community of license); *Helen Broadcasters, Inc. et al.*, Hearing Designation Order, 5 FCC Rcd 5642 (1990) (failure to provide line-of-sight signal coverage does not necessarily imply deficient coverage); and *Idaho Broadcasting Consortium, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5264 (1996) (applicant, using standard prediction methodology, demonstrated compliance with Section 73.315, and objector's single terrain profile failed to provide sufficient support for its contention that a "major obstruction" would block city coverage).

²⁴ See *Lightning Bug Broadcasting, et al.*, Hearing Designation Order, 5 FCC Rcd 5404 (MMB 1990).

²⁵ Petition at 5.

²⁶ Petition at 7 and 12.

²⁷ See *Wendell and Associates*, Memorandum Opinion and Order, 14 FCC Rcd 1671, 1679 (1998) ("It is clear from the staff's order that it considered [the objector's] pleadings, which is all that was required") ("*Wendell*"); see also *Pamplin Broadcasting, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 649, 653 (2008) ("There is no requirement that the staff's analysis be of a minimum length.").

²⁸ See, e.g., *Wendell*, 14 FCC Rcd at 1679 (1998) (in addressing a petition to deny, the staff need issue only a "concise statement" of the reasons for denying the petition); *CMP Houston-KC, LLC*, Memorandum Opinion and (continued . . .)

Assignment Application. Because the Assignment Petition incorporates and relies upon arguments raised in the earlier Petition, for the reasons set forth above, we reject those arguments and find that Buckley fails to raise a substantial and material question of fact calling for further inquiry regarding the Assignment Application.²⁹ Additionally, we have examined the Assignment Application and find that it complies with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity.

Conclusion/Actions. Accordingly, for the reasons discussed above, IT IS ORDERED, that Buckley's January 22, 2008, and May 27, 2008, Petitions for Reconsideration ARE DENIED. IT IS FURTHER ORDERED, that Buckley's June 6, 2008, Petition to Deny IS DENIED.

IT IS FURTHER ORDERED, that the application to assign the construction permit for a new FM station at Carmel Valley, California (File No. BALH-20080502ABW) from Aurora Communications, Inc., to Lazer Licenses, LLC, IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Aurora Communications, Inc.
Buckley Broadcasting of California, LLC

(Continued from previous page)
Order, 23 FCC Rcd 10656, 10660 (2008) (Commission rejects complaint that the staff did not address the merits of appellants' arguments); *M2Z Networks, Inc. v. FCC*, Case No. 07-1360 at p.10 (D.C. Cir. rel. Mar. 10, 2009) (appeals court found that it was adequate for the Commission to name a factor – maintaining competitive market conditions – and give two reasons why the application would undermine that factor).

²⁹ See 47 U.S.C. § 309(d); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).